KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE: (202) 955-9608
EMAIL: saugustino@kelleydrye.com

December 8, 2004

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 04-313, *UNE Permanent Rules Proceeding*

Dear Ms. Dortch:

XO Communications, Inc., by its attorneys, submits this letter to address the wire center line count data submitted by several Regional Bell Operating Companies after the comment period in this proceeding. As discussed below, the wire center line count data show that business line counts alone are an unreliable predictor of whether impairment has been overcome on a given transport route. At all line counts below 30,000 business lines, over 50 percent of the wire centers have two (2) or fewer fiber-based collocated carriers. Even with respect to wire centers with between 30,000 and 50,000 business lines, approximately 33 percent of the wire centers have two (2) or fewer collocated carriers. This significant variance in the presence of fiber-based collocated carriers precludes the Commission from finding non-impairment at the low thresholds that some report are under consideration at this time. XO recommends that the "top tier" for the transport analysis be set either (a) as routes between two central offices each with 50,000 business switched access lines or (b) routes between two central offices each with 35,000 business switched access lines *and* four (4) or more fiber-based collocators in each office.

## A. THE BOC WIRE CENTER DATA SHOW A SIGNIFICANT LACK OF DEPLOYMENT ACROSS VIRTUALLY ALL SIZES OF WIRE CENTERS

During the comment period, only BellSouth filed wire center level information identifying the size of the wire center and the number of collocated carriers in each central office. In its reply comments, the Loop and Transport CLEC Coalition (of which XO is a

member) demonstrated that BellSouth's data confirm that multiple competitive supply is very rare.[1] This level of competitive deployment belied the RBOCs' claims of non-impairment at very low line counts, and instead supported the finding that the relevant central offices must have much higher line counts before the Commission may find non-impairment on a given transport route.

After the comment period, Verizon, SBC, and Qwest each filed wire center line count data for their regions.[2] As with BellSouth, these RBOCs filed the data on a confidential basis, making it difficult for XO to review the data. In addition, because the RBOCs prohibited copying of the data itself, and because Verizon, SBC and Qwest masked the eight (8) character CLLI of the wire centers while all of the RBOCs (including BellSouth) withheld the identities of each alleged fiber-based collocator in an end office, *XO is unable to verify any of the data submitted by the RBOCs.*

XO understands that the RBOCs have recently re-filed line count data at the request of the Policy Division staff.[3] Due to the lateness of this filing, XO has not had an opportunity to review any of the new data. Further, XO understands that BellSouth has now decided to join its RBOC brethren in masking the 8 character CLLI from its wire centers, depriving XO of the opportunity to compare the initial and revised data. If requested by the

---

1 *See* Loop and Transport CLEC Coalition Reply Comments at 30-31 (95% of BellSouth wire centers below 25,000 lines have three or fewer collocated carriers).

2 Letter from Edward J. Shimizu to Marlene H. Dortch, October 28, 2004, WCB Docket Nos. 04-313 and 01-338 (Verizon Line Count Ex Parte); Letter from Craig J. Brown to Marlene H. Dortch, November 1, 2004, WCB Docket Nos. 04-313 and 01-338 (Qwest Line Count Ex Parte). SBC's Line Count Ex Parte does not appear on ECFS in either docket 04-313 or 01-338. The only reference to its filing appears in an erratum filed by Brian J. Benison on November 16, 2004. *See* Letter from Brian J. Benison to Marlene H. Dortch, November 16, 2004, WCB Docket Nos. 04-313 and 01-338 (SBC Line Count Erratum). Although the information was submitted to the FCC on or around November 1, the filings were not made available on the Commission's ECFS system until several weeks later. XO only learned of the data on the Friday before the Thanksgiving holiday.

3 *See* Letter from Bennett L. Ross to Marlene H. Dortch, December 7, 2004, WCB Docket Nos. 04-313 and 01-338 (BellSouth Revised Line Count Ex Parte); Letter from Cronan O'Connell to Marlene H. Dortch, December 7, 2004, WCB Docket Nos. 04-313 and 01-338 (Qwest Revised Line Count Ex Parte); Letter from Edward J. Shimizu to Marlene H. Dortch, December 7, 2004, WCB Docket Nos. 04-313 and 01-338 (Verizon Revised Line Count Ex Parte); Letter from Brian J. Benison to Marlene H. Dortch, December 7, 2004, WCB Docket Nos. 04-313 and 01-338 (SBC Revised Line Count Ex Parte).

Commission staff, XO will use its best efforts to respond to the revised line count data in the time permitted in this proceeding.[4]

Nevertheless, assuming the initial line count data to be accurate and that the data accurately identifies fiber-based collocators, XO asked Dr. Michael Pelcovits of the consulting firm MiCRA to examine the RBOC data. The results of MiCRA's analysis are presented in Attachment 1 and are discussed below. MiCRA grouped the RBOC wire centers into nine ranges of wire center size, as measured by the business line counts reported in the RBOC data.[5] For each wire center size range, MiCRA tallied the number of wire centers with a given number of collocations reported by the RBOC – from zero to a maximum of 24 reported collocators. Data was aggregated from all of the RBOCs and the results are reported in Attachment 1.

As the data show, the presence of multiple competitive supply in a wire center is the exception, not the rule. For this purpose, XO assumes that the presence of three (3) carriers with their own facilities in use at the relevant capacity level is the minimum benchmark for multiple competitive supply in a wire center.[6] The RBOC data do not show whether a carrier has active circuits (at any capacity level) between the two end points of a transport route. Instead, the data identify a number of collocators in a wire center, which may enable an inference of deployment if one assumes (a) that the *same* collocators are on both ends, (b) that the collocator has deployed the equipment and facilities necessary to connect the two end points, and (c) that the collocator is using circuits at the relevant capacity level. XO submits that the presence of four (4) collocators is the minimum necessary to infer that at least three of those collocators may

---

4 If the revised line count data differ significantly from that analyzed by XO here, the Commission would be well within its discretion to give no weight to the new data. *See* Unbundled Access to Network Elements, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 15 (warning parties of filing restraints in this proceeding "to ensure that the issues in this proceeding are fully and fairly presented within the severe constraints on the Commission by the necessity of formulating permanent rules quickly"); *see also Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981) (stating if "documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment...then both the structure and the spirit [of the Clean Air Act] would have been violated."); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20571-72 (according new factual evidence submitted late in the process no weight).

5 For purposes of this analysis MiCRA excluded data relating to Verizon/GTE wire centers, due to the laborious process required to tally data by hand at Verizon's premises. Only Verizon/Bell Atlantic wire centers are included in the tally.

6 *See TRO* ¶ 407 (setting the self-provisioner test at three providers that have deployed and are using their own facilities).

have actually deployed facilities between a given point.[7] Thus, XO looked for instances where four or more collocators were present in the wire centers.

The data showed that, for every group of wire centers below 30,000 business switched access lines, two-thirds (67%) or more of the wire centers had fewer than four (4) collocators present in the wire center.[8] Conversely, it is not until the wire center size exceeds 50,000 business switched access lines that the presence of four (4) or more collocators exceeds 75 percent[9] In other words, the instance of "false negatives" (false findings of non-impairment) are significant – indeed more likely than not – for every wire center size below 30,000 business switched access lines. Rational agency decisionmaking requires a better percentage than that. (Indeed, a coin flip would have a better chance of being correct (50%) than would use of a wire center threshold below 30,000 lines.)

One likely reason for this result is that the barriers to entry affecting impairment on a transport route encompass more than the size of the wire centers on the route. In the *Triennial Review Order*, the Commission found that CLECs use dedicated transport as a means to aggregate end user traffic between two points in order to achieve economies of scale.[10] The Commission found that the factors influencing the costs of self-deployment – and, by extension, the barriers creating impairment – include (a) collocation costs of each central office, (b) the cost of the fiber, (c) the cost of deploying the fiber, (d) the cost of equipment necessary to activate the fiber, and (e) the time and cost associated with obtaining rights of way along the route.[11] With respect to the costs of deploying the fiber, these costs vary decisively from route to route, depending upon whether the route is in an urban or rural area, how the fiber is deployed (aerial vs. buried fiber, type of conduit, etc.) and right of way costs.[12] Wire center size at best stands as a proxy for the potential demand that could be aggregated between the two end points. It does not – as the data show – reliably predict the existence or absence of the remaining factors the Commission identified as influencing impairment. If the Commission were to rely solely on line counts to find impairment on routes between "large" central offices, it would impermissibly "loftily abstract away from all specific [transport] markets," in violation of *USTA I's*

---

7 Indeed, this number probably is too low, as 75% of the collocators in an end office would have had to deploy facilities to connect the end point. The state TRO proceedings, revealed that few carriers had in fact deployed facilities in this manner.

8 Even if the number of collocators is lowered to three collocators, the data show that over half of the wire centers below 30,000 lines have fewer than three collocators.

9 For a threshold of three collocators, 86% of wire centers above 50,000 lines have three or more collocators.

10 *TRO*, ¶ 370.

11 *Id.*, ¶ 371.

12 *See id.*

admonition.[13] The variance in the data requires that the Commission deploy a more nuanced approach to identifying the large transport routes where CLECs are not impaired.[14]

Some RBOCs have contended that the Commission must find non-impairment even in the absence of deployment because, they say, the Commission's task is to identify where "competition is possible." This argument is derived from *USTA II's* discussion of the Commission's route-specific approach, and the court's alleged admonishment to consider the impact of "similar routes." However, the D.C. Circuit did not require a finding of impairment when the characteristics of the two routes are likely to vary decisively.[15] In fact, the RBOC argument rests on the proposition that because there is deployment on the A-B route, the Commission *must* find non-impairment on an A-C route. This proposition was squarely rejected by the D.C. Circuit, which found that the Commission had explained why A-B deployment was not sufficient to establish that competition on A-C is possible.[16] Thus, it is not reasonable to infer from deployment in 50 percent of the instances that deployment is possible in the other 50 percent of the instances. This is particularly true with respect to dedicated transport, where the Commission identified rights of way, geography and the use of buried or aerial cable as factors affecting potential deployment. None of these factors are addressed by the size of the wire centers on the route.

To address these variances, the Commission must set a Tier 1 threshold one of two ways. First, it could raise the wire center line threshold to a level where the vast majority of instances already show multiple competitive supply. Based on the RBOC wire center line count data, only a threshold above 50,000 business switched access lines approaches this standard. Alternatively, the Commission could rely on both wire center size *and* the number of collocators as a proxy for impairment. With this approach, the wire center size must be large enough to be an accurate predictor a substantial majority of the time – approximately two-thirds of the time likely is sufficient – and the number of collocators must give a reasonable assurance that deployment has occurred or is possible on the route. Based on the RBOC line count data, a standard which requires a wire center of at least 35,000 lines *and* four or more fiber based collocators could serve as a reasonable basis for a finding of non-impairment for dedicated transport.

---

13 *See USTA I*, 290 F.3d at 423.

14 *USTA II*, 359 F.3d at 575 (the Commission must consider error costs of alternative market definitions).

15 *USTA II*, 359 F.3d at 570.

16 *Id.*, at 575 (citing *TRO*, ¶ 401.

## B. FIBER-BASED COLLOCATORS

Examination of the RBOC wire center line count data reveals one additional issue that should be clarified by the Commission. Although all of the RBOCs report "fiber-based collocators," none of them provide a precise definition of what they mean by this term, nor is it likely that they applied the same criteria to this term. As noted above, none of the RBOCs identified the collocators by name, so it is impossible for CLECs to verify the RBOC reports of fiber based collocators or to discern the criteria used through a form of reverse engineering. For example, XO recently purchased the assets of Allegiance Telecom, another facilities-based CLEC. Many of Allegiance's collocations were located in central offices where XO already is collocated. XO is concerned that the RBOC data double count these collocations, listing XO as two collocators in these central offices, rather than one. XO has no way to determine whether this is the case with the data that the RBOCs have submitted.

At bottom, a key element of the evidence the RBOCs present cannot be verified at this time. Because it will not be possible to verify the accuracy of the data, the Commission should define the minimum criteria to be a "fiber based collocator" in order to guard against RBOC data that may overcount fiber-based collocators. XO submits that these criteria should be based on the operational readiness criteria adopted in the *TRO*.[17] Specifically, a fiber based collocator should:

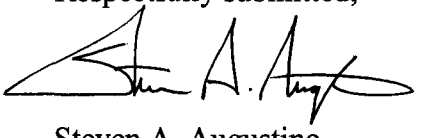
- Have an operational physical collocation in an ILEC central office or in a fiber distribution frame;
- Have installed equipment in the collocation and be operationally ready to provide transport into or out of the incumbent LEC central office;
- Be unaffiliated with the ILEC *and* with other fiber based collocators in the central office (For example, XO and Allegiance collocations should be counted only once);
- Use fiber transport facilities that it owns or leases on a long-term IRU basis; and
- Utilize facilities that are comparable in quality to incumbent LEC transport facilities.

---

17 *See TRO*, ¶¶ 406-08, 414.

These criteria are necessary to ensure that the Commission counts only facilities that are true actual or potential alternatives to incumbent LEC transport. For example, in the Florida proceeding, the BellSouth trigger evidence relied on collocation information that proved to be inaccurate in many instances. BellSouth's initial list of collocators included several carriers that had gone into bankruptcy and ceased operations. It also listed several collocation arrangements originally provisioned to carrier A but subsequently transferred to carrier B as both carrier A's and carrier B's facilities. Finally, in the instance of one Florida-based carrier, BellSouth counted over 170 collocations based on collocation applications submitted by the carrier. That carrier produced evidence that it in fact had deployed equipment to only a handful of these collocations, and let the rest of the applications lie unused. Shortly before the hearing was scheduled in Florida, BellSouth revised its transport route list to exclude virtually all of these collocations. In order to ensure that errors such are these do not color the Commission's impairment findings, the Commission should define a "fiber based collocator" as described above.

Respectfully submitted,



Steven A. Augustino
*Counsel to XO Communications*

cc: Christopher Libertelli, Legal Advisor to Chairman Powell
Mathew Brill, Legal Advisor to Commissioner Abernathy
Scott Bergmann, Legal Advisor to Commissioner Adelstein
Jessica Rosenworcel, Legal Advisor to Commissioner Copps
Daniel Gonzalez, Legal Advisor to Commissioner Martin
Jeffrey Carlisle, Chief, Wireline Competition Bureau
Michelle Carey, Deputy Chief, Wireline Competition Bureau
Thomas Navin, Wireline Competition Bureau
Jeremy Miller, Wireline Competition Bureau
Russell Hanser, Wireline Competition Bureau

# COMPLIATION OF RBOC LINE COUNT DATA

**Total Number of Business Lines Per Wire Center**

| Collocators Per Wire Center | >60K | 50K-40K | 40K-35K | 35K-30K | 30K-25K | 25K-20K | 20K-15K | 15K-10K | 10K-5K | Total | Percentage |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 0 | 4 | 9 | 3 | 8 | 27 | 45 | 117 | 308 | 688 | **1209** | 49.8% |
| 1 | 4 | 8 | 8 | 4 | 21 | 48 | 60 | 121 | 160 | **434** | 17.9% |
| 2 | 4 | 6 | 4 | 11 | 14 | 20 | 39 | 55 | 71 | **224** | 9.2% |
| 3 | 8 | 10 | 10 | 9 | 19 | 17 | 24 | 44 | 32 | **173** | 7.1% |
| 4 | 5 | 8 | 5 | 6 | 9 | 11 | 19 | 14 | 11 | **88** | 3.6% |
| 5 | 6 | 7 | 5 | 11 | 9 | 10 | 18 | 11 | 13 | **90** | 3.7% |
| 6 | 4 | 5 | 6 | 4 | 8 | 6 | 17 | 3 | 5 | **58** | 2.4% |
| 7 | 4 | 3 | 2 | 4 | 5 | 7 | 4 | 7 | 1 | **37** | 1.5% |
| 8 | 8 | 4 | 1 | 6 | 3 | 3 | 3 | 3 | 2 | **33** | 1.4% |
| 9 | 7 | 2 | 1 | 2 | 3 | 5 | 1 | 0 | 0 | **21** | 0.9% |
| 10 | 5 | 2 | 1 | 0 | 1 | 1 | 3 | 0 | 0 | **13** | 0.5% |
| 11 | 2 | 3 | 1 | 2 | 1 | 0 | 1 | 0 | 0 | **10** | 0.4% |
| 12 | 4 | 2 | 0 | 2 | 1 | 0 | 1 | 0 | 0 | **10** | 0.4% |
| 13 | 2 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | **3** | 0.1% |
| 14 | 3 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **6** | 0.2% |
| 15 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **1** | 0.0% |
| 16 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **2** | 0.1% |
| 17 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **2** | 0.1% |
| 18 | 4 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **4** | 0.2% |
| 19 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **2** | 0.1% |
| 20 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **2** | 0.1% |
| 21 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **2** | 0.1% |
| 22 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **2** | 0.1% |
| 23 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **1** | 0.0% |
| 24 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | **1** | 0.0% |
| Total | 82 | 73 | 47 | 69 | 121 | 173 | 308 | 566 | 983 | 2428 | 100.0% |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **2 or fewer Collocators** | 12 | 23 | 15 | 23 | 62 | 113 | 216 | 484 | 919 | 1867 |
| **Percentage** | **13.6%** | **31.5%** | **31.9%** | **33.3%** | **51.2%** | **65.3%** | **70.1%** | **85.5%** | **93.5%** | **76.9%** |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **3 or fewer Collocators** | 20 | 33 | 25 | 32 | 81 | 130 | 240 | 528 | 951 | 2040 |
| **Percentage** | **22.7%** | **45.2%** | **53.2%** | **46.4%** | **66.9%** | **75.1%** | **77.9%** | **93.3%** | **96.7%** | **84.0%** |